

1 CHRISTOPHER E. PLATTEN - 111971
2 CAROL L. KOENIG - 162037
3 WYLIE, McBRIDE, PLATTEN & RENNER
4 2125 Canoas Garden Avenue, Suite 120
5 San Jose, California 95125
6 Telephone: (408) 979-2920
7 Facsimile: (408) 979-2934

8 Attorneys for Plaintiffs JEFFREY WELCH,
9 GLEN BISHOP, MITCHELL WITSINSKI,
10 ROBERT CULBERTSON
11 and other employees similarly situated

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14 JEFFREY WELCH, GLEN BISHOP,
15 MITCHELL WITSINSKI, ROBERT
16 CULBERTSON and other employees
17 similarly situated,

18 Plaintiffs,

19 vs.

20 CITY OF SAN JOSE,

21 Defendant.
22 _____/

23 NATURE OF COMPLAINT

24 1. Plaintiffs are, or at all times material were, employees of the Defendant CITY
25 OF SAN JOSE ("City"), California, and they bring this action on behalf of themselves and
26 those similarly situated. This is an action for declaratory judgment under 28 U.S.C. sections
27 2201 and 2202 and for compensation and other further relief under the Fair Labor
28 Standards Act, as amended, 29 U.S.C. sections 201, *et seq.*

JURISDICTION AND VENUE

2. Jurisdiction of this action is conferred on this court by 28 U.S.C. section 1331
because the action arises under the FLSA, a federal law, and because such suit is
authorized by 29 U.S.C. section 216(b). Venue lies within this district pursuant to 28 U.S.C.

ADR

E-FILING

ORIGINAL FILED

APR 24 2008

Richard W. Wieking
Clerk, U.S. District Court
Northern District of California
San Jose

JF
PVT

Case 08-02132

COMPLAINT FOR DECLARATORY
JUDGMENT, COMPENSATION UNDER
THE FAIR LABOR STANDARDS ACT
AND OTHER RELIEF

1 section 1391 and Local Rule 3-2(d) because the events giving rise to the action took place
2 in Santa Clara County.

3 INTRADISTRICT ASSIGNMENT

4 3. The basis for assignment to the San Jose Division, pursuant to Civil Local
5 Rule 3-2(d), is that this action arises in the County of Santa Clara.

6 PARTIES

7 4. Plaintiffs are, or at all times material were, employees of the City of San Jose.
8 Each of the plaintiffs has given their written consent to be a party in this action pursuant to
9 29 U.S.C. section 216 (b).

10 5. Defendant City is a political subdivision of the State of California, a public
11 agency within the meaning of 29 U.S.C. section 203(d).

12 CLAIMS FOR RELIEF

13 6. At all times material, the Plaintiffs have been entitled to the rights, protections
14 and benefits provided under the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.
15 sections 201, *et seq.*

16 7. At all times material, the Plaintiffs have worked hours in excess of the hourly
17 levels specified in the FLSA, 29 U.S.C. section 207. As a result, at all times material,
18 Plaintiffs have been entitled to overtime compensation at a rate not less than one and one-
19 half times their regular rate of pay for the hours of overtime worked.

20 8. Plaintiffs are, or at all times material were, firefighters and employees
21 engaged in fire protection for the City. Under the FLSA and the Department of Labor's
22 regulations applicable to firefighter employees, the employer may establish and declare a
23 work period of not less than seven days nor more than 28 days. (29 U.S.C. section 207; 29
24 C.F.R. section 553.201.) The City has established and declared a work period of 14 days
25 for administrative employees and 28 days for employees who perform suppression (shift)
26 work.

27 9. Pursuant to the Department of Labor's regulations, the Defendant must pay
28 administrative employees assigned to a 14 day work period overtime compensation at a

1 rate not less than one and one-half times their regular rate of pay (hereinafter "FLSA rate")
2 for hours worked in excess of 106 hours per 14-day work period. (29 C.F.R. § 553.230)
3 Also pursuant to the Department of Labor's regulations, the Defendant must pay
4 suppression employees assigned to a 28-day work period overtime compensation at a rate
5 not less than one and one-half times their "regular rate" of pay for hours worked in excess
6 of 212 hours per 28-day work period. (29 C.F.R. § 553.230) The FLSA "regular rate" of
7 pay, as defined by statute, must include holiday "in lieu of pay" and certain premium pays
8 (e.g., Emergency Medical Technician pay, bilingual pay, education incentive pay,
9 administrative assignment pay, etc.). Overtime hours which do not result in more than 106
10 total hours of work in a 14-day period for administrative employees or 212 hours in a 28-
11 day work period for shift employees may be paid at one and one-half times a lower hourly
12 rate.

13 10. The City has adopted and is using a payroll accounting system that regularly
14 undercounts the number of overtime hours for which the FLSA rate applies for Plaintiffs
15 working as administrative employees and for Plaintiffs working as suppression employees.
16 That is, the City is paying the lower non-FLSA rate of pay for overtime hours that, under
17 law, should be paid at the higher FLSA rate. As a result, the overtime pay that the City has
18 been paying is frequently less than that to which the Plaintiffs are entitled to by the FLSA.

19 11. Since before April 23, 2005, the City has violated, and is continuing to violate,
20 29 U.S.C. section 207 and the regulations of the U.S. Department of Labor by failing and
21 refusing to pay FLSA overtime compensation to Plaintiffs at a rate not less than one and
22 one-half times the FLSA rate for hours worked in excess of the hourly and work period
23 standards applicable to firefighter employees under 29 U.S.C. section 207(k).

24 12. The City's violations of the FLSA as alleged herein have been done in a
25 willful and bad faith manner in that the City received notice through a previous court action
26 that it must include holiday-in-lieu pay and other premium pays when calculating the FLSA
27 rate of pay and that the FLSA rate must be paid for all hours worked in excess of the
28

1 statutory limits of 106 for administrative employees and 212 for shift employees. (*Sekany v.*
2 *City of San Jose*, Case No. 98-21081 JW)

3 13. In addition, the City was notified by the Plaintiffs in December 2007 that the
4 payroll system it has adopted was undercounting the number of overtime hours subject to
5 the FLSA rate of pay. Despite the Plaintiffs demand that the City correct this
6 undercounting, the City refused, and has continued to refuse, to correct the problem.

7 14. As a result of these willful violations of the FLSA, overtime compensation has
8 been unlawfully withheld by the City from Plaintiffs for which Defendant is liable pursuant to
9 29 U.S.C. section 216(b), together with an additional equal amount as liquidated damages,
10 interest, reasonable attorney fees and the costs of this action.

11 15. The employment and work records for each Plaintiff are in the exclusive
12 possession, custody and control of the City, and the Plaintiffs are unable to state at this
13 time the exact amount owing to each of them. The City is under a duty imposed by 29
14 U.S.C. section 211(c) and the regulations of the U.S. Department of Labor to maintain and
15 preserve payroll and other employment records with respect to Plaintiffs from which the
16 amounts of the City's liability can be ascertained.

17 PRAYER FOR RELIEF

18 WHEREFORE, the Plaintiffs, on their own behalf and on behalf of others similarly
19 situated, pray that this Court:
20

- 21 1. Enter a declaratory judgment declaring that the City has willfully and
22 wrongfully violated its statutory and legal obligations, and deprived Plaintiffs
23 of their rights, protections and entitlements under federal law, as alleged
24 herein;
 - 25 2. Order a complete and accurate accounting of all compensation to which
26 Plaintiffs are entitled;
- 27
28


3. Award each Plaintiff monetary damages in the form of back pay compensation, and liquidated damages equal to their unpaid compensation, plus pre-judgment interest and post-judgment interest;
4. Award Plaintiffs their reasonable attorney's fees to be paid by the City, and the costs of this action; and
5. Order the City to modify its payroll accounting system so that it accurately calculates and pays the amount of FLSA overtime compensation to which the plaintiffs are entitled.
6. Grant such other relief as may be just and proper.

Dated: April 23, 2008

Respectfully submitted,

WYLIE, McBRIDE,
PLATTEN & RENNER


CHRISTOPHER E. PLATTEN


CAROL L. KOENIG
Attorneys for Plaintiffs

I:\230\71696\complaint

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

JEFFREY WELCH, GLEN BISHOP, MITCHELL
WITSINSKI, ROBERT CULBERTSON, and other
employees similarly situated

DEFENDANTS

CITY OF SAN JOSE

C08 02132

JF

PVT

(b) County of Residence of First Listed Plaintiff SANTA CLARA
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant SANTA CLARA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, LOCATION OF THE
OF LAND INVOLVED.

Attorneys (If Known)

ADR

(c) Attorney's (Firm Name, Address, and Telephone Number)

CAROL L. KOENIG, ESQ. #162037
CHRISTOPHER E. PLATTEN, ESQ. #111971
Wyllie, McBride, Platten & Renner
2125 Canoas Garden Ave #120
San Jose, CA 95125

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 | <input checked="" type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input checked="" type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS - Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PRISONER PETITIONS <input type="checkbox"/> 510 Motion to Vacate Sentence <input type="checkbox"/> Habeas Corpus: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition			

V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

29 U.S.C. §201 et. seq.

Brief description of cause: Failure to pay proper FLSA overtime

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ undetermined
UNDER F.R.C.P. 23

☐ CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE JAMES WAREDOCKET NUMBER C07-06424 JW

DATE

April 23, 2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

NDC-JS44